SUPREME COURT DECIDES AGAINST WALTER G. SMITH

(Continued from page 4.)

the offense there stated, * * * such offense so recited is, so far as the petitioner is concerned, a constructive and not a direct contempt. The recital is that "Walter G. Smith was guilty of a contempt of this court by publishing and printing" a certain statement and cartoon, "which said * * * statement and * * * cartoon was circulated and published in the court room in the court house in Honolulu during the trial * * *" This is not a statement that the matter was circulated and published in the court room or caused to be so circulated and published by Smith; it is not a recital of a conviction of Smith for contempt by "publishing and printing" and by "circulating and publishing in the court room." In my opinion, as stated above, the printing and publication generally away from the court room may have been by Smith and the circulation and publication in the court room may have been by others for whose acts Smith would not be criminally responsible.

It may be remarked in this conection that it is not to be presumed that the court or the clerk issuing the mittimus intended or attempted to make therein an untrue or incorrect recital as to what the conviction or judgment was; and if it had been intended or attempted to state in the mittimus that the petitioner had been convicted or adjudged guilty of circulating and publishing in the court room, such statement would have been untrue and incorrect. After the introduction of the evidence, Circuit Judge Humphreys (the three judges of the Circuit Court sat together during the proceedings, but in what capacity or whether legally or otherwise I need not say), delivered the opinion of the judges or of the court and in concluding said: "It is the unanimous opinion of the judges of this court that the defendant should be held guilty as charged in the complaint herein." Following him Judge Gear, presiding at the term, said: "The judges have unanimously decided that this matter published has constituted a contempt of court as charged in the complaint or affidavit and I therefore find and adjudge you guilty of contempt of court as alleged and set out in the affidavit on file and ask you now if you have any reason to offer why sentence should not be passed upon you. * * * And I will state now that the court has considered with both the other judges and come to the conclusion as to a proper sentence to be pronounced, having taken that into consideration in extenuation of the offense, and it is therefore the judgment of this court that you be and you are hereby adjudged guilty of contempt of court as set forth in the affidavit, and you are sentenced to imprisonment in Oahu Jail for the period of thirty days without hard labor." Clearly the adjudication of guilt was of the offense charged in the affidavit and that, as already stated, was a constructive contempt only and not a circulation or publication in the court room.

Going still further, and assuming that the paragraph of the mittimus in question is a recital of a conviction of Smith of a contempt by printing and publishing and by circulating and publishing in the court room, and assuming that such finding of the court below cannot be disturbed on habeas corpus even though there be no evidence to support it, I am of the opinion that the sentence and mittimus are invalid because the court had no jurisdiction to impose the one or issue the other in the absence of a conviction or judgment of guilty of that offense (this, of course, in view of my conclusion, to be hereafter stated, that the Circuit Courts of this Territory have no authority to punish for constructive contempts). The authorities above cited sufficiently cover this point. The principle is the same where the conviction is of an offense which the court has no jurisdiction to punish and the sentence and mittimus are for another and different offense, as where there is no conviction or judgment at all.

Has the Circuit Court of the First Circuit power to punish for constructive contempt? Under this head several questions have been presented and argued.

In August, 1888, the legislature of the monarchy passed an act (Chap. 42, Laws of 1888) the second section of which reads as follows: "Constructive contempts shall not hereafter be punishable as such." This language, taken by itself, is plain—so plain as to leave no room for construction. It is contended, however, that read in connection with the two other sections of the statute, and in view of the causes that led to its enactment, it must be construed to refer to such only of constructive contempts as are mentioned in section 1. The latter section reads: "The publication of proceedings before any court or judge shall not be deemed to be contempt, nor shall such publication be punishable as contempt;" and section 3: "The terms of this act shall apply to the publication of all proceedings in all courts, or before all judges, hitherto had, now pending or which may hereafter be brought." In my opinion, sections 1 and3 do not contain sufficient to justify the limitation sought to be placed upon the plain language of section 2. If the words, "constructive contempts" used in section 2, were intended to refer solely to the "publication of proceedings," mentioned in section 1, then section 2 is pure repetition and wholly superfluous. Section 1 of itself provides that such publication shall not be deemed to be contempt and further that such publication shall not be punishable as contempt. Under the circumstances, the presumption, if any, is that the legislature did not repeat unnecessarily and that it intended to include in section 2 something not already included in section 1. The presumption is further that the legislature in using the word "constructive," knew distinction between constructive and direct contempts. The purpose of section 2 evidently was to provide that the proceedings permitted by the act, to wit, by section 1, to be published, included all proceedings, in whatever court and at whatever times had.

In enacting this statute the legislature doubtless had in mind certain cases then recently decided by the Supreme Court but it is a mistake to suppose that those decisions were simply to the effect that the publication of proceedings was a constructive contempt and punishable as such. Such indeed was the ruling in Smith vs. Aholo, supra, decided in April, 1887; but in Ackerman vs. Congdon, supra, decided in January, 1887, the publication held to be a constructive contempt was, not of proceedings, but of newspaper comments or expressions which were deemed to be such as tended to influence the result of a pending suit. The same is true of the publication, held to be contempt, in King vs. Lee Fook, 7 Haw., 249 (decided at the February term, 1888, just before the legislature convened). It was not of proceedings but of matter tending to prejudice the right of the defendant to a fair and impartial trial. So far as history is concerned, then, there is good reason for believing that the legislature meant what it said, i. e., to prohibit thereafter the punishment as such of constructive contempts (which means any or all constructive contempts), and not merely of some constructive contempts.

In the case entitled In re Bush, 8 Haw., 221, the court construed the statute differently, holding that by "constructive" contempts the legislature meant those only which were not enumerated in section 257 of the Penal Laws. With respect, it seems to me that there is no sufficient ground for so construing the statute. It is contended that this court must now follow that decision because of the rule that where a statute, which has received a judicial construction, is re-enacted in the same or substantially the same terms, that is to be deemed a legislative adoption of such construction. The re-enactment here referred to is that contained in the Organic Act. The question is one as to the intention of Congress in passing the Organic Act, and this intention is to be ascertained from a reading of the Act as a whole. Section 6 provides "that the laws of Hawaii not inconsistent with the constitution or laws af the United States or the provisions of this Act shall continue in force, subject to repeal," etc. "Continue in force" means "be of the same force," not more and not less, after as before the time stated. Section 81 provides that "until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." Before the Organic Act went into effect the Supreme Court had jurisdiction and authority to overrule any of its former decisions, with possibly some exceptions, real or apparent but not here material, and the act of 1888 was open to construction by the court and subject to having any former construction modified if to the court it should seem right and just to do so. In my opinion, Congress intended by the Organic Act to continue the same powers in this court in this respect which it theretofore had and the rule of construction contended for does not apply in this case. In so far, then, as the court in the Bush case held to the contrary on the subject of the construction of the Act of 1888, it should be overruled.

It is also contended that section 257 of the Penal Laws, which defines certain acts to be contempts, sets forth in the enumeration certain constructive contempts, that therefore if section 2 of the Act of 1888 is construed to include constructive contempts other than the publication of proceedings, that act would by implication repeal section 257 in part, and that repeals by implication are not favored. It is true that repeals by implication are not favored, but nevertheless there may be such repeals, and they are to be given effect where the language and intent are clear.

The argument that the restriction contained in the Act of 1888 does not apply to the Circuit Court of the First Circuit because said court was not then in existence, is not sound. The provision clearly is sufficiently broad to apply to courts thereafter created as well as to courts then in existence. "The mere fact that the statute existed before the court was created does not exclude it. The legislature made use of general language for the purpose, as it would seem, of applying the act not only to existing courts but to any that might thereafter be created." Middlebrook vs. State, 43 Conn., 267.

Was the Act of 1888 unconstitutional? The constitution in force at the time of its enactment was that of 1887, Article 64 of which was as follows: "The judicial power of the Kingdom shall be vested in one Supreme Court, and in such inferior courts as the legislature may from time to time establish." Article 66 reads: "The judicial power shall be divided among the Supreme Court and the several inferior courts of the Kingdom, in such manner as the legislature may from time to time prescribe, and the terms of office in the inferior courts of the Kingdom shall be such as may be defined by the law creating them." The Circuit Court of the First Circuit was created by the legislature under that provision of the constitution. It was, under the monarchy and the republic, a legislative as distinguished from a constitutional court, and it was competent for the legislature which created it to define or limit its powers in the matter of contempts. "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power. But the power has been limited and defined by the act of Congress of March 2d, 1831. The act, in terms, applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the constitution, may perhaps be a matter of doubt. But that it applies to the Circuit and District Courts there can be no question. These courts were created by act of Congress. Their powers and duties depend upon the act calling them into existence, or subsequent acts extending or limiting their jurisdiction. The Act of 1831 is, therefore, to them the law specifying the cases in which summary punishment for contempts may be inflicted. It limits the power of these courts in this respect to three classes of cases: First, where there has been misbehavior of a person in the presence of the courts, or so near thereto as to obstruct the administration of justice; second, where there has been misbehavior of any officer of the courts in his official transactions; and third, where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments and processes." Ex parte Robinson, 19 Wall., 505, 510, 511. See also Ex parte Ruskirk, 72 Fed., 19; Ex parte Poulson, Fed. Cs., No. 11,350; State vs. Kaiser, 20 Or., 57. Whether or not the Act of 1888 applied at the time of its enactment or applies now to the Supreme Court, is another question. Even if it did not so apply, still it was constitutional as to the inferior courts. See Robertson vs. Pratt, 13 Haw., 590.

The Act of 1888, being valid at the time of its enactment and in force at the date of the Organic Act, was continued in force by section 6 of the latter act.

It is contended that the Organic Act is the constitution of this Territory, that since in section 81 it is provided "that the judicial power of the Territory shall be vested in one Supreme Court, Circuit Courts and in such inferior courts as the legislature may from time to time establish," the Circuit Court of the First Circuit is a constitutional court, and that therefore its powers to punish for contempt cannot be limited. If, however, we are to regard the Organic Act as our constitution and as the instrument by which the Circuit Court was created, then it is also true that the limitation of authority was by the same instrument and by the same power which created the Circuit Courts. Surely the power, whether it be the people directly or Congress, which grants a constitution and thereby creates a court, may also define or limit the powers of that court. It may even legislate it out of existence.

My conclusion is that section 2 of the Act of 1888, in its application to the Circuit Court of the First Circuit is constitutional, valid and in force. Nor is the restriction thereby placed upon that court a novel one. The citations already made disclose some instances of similar limitations elsewhere; for other instances see Laws of Pa., Duplicate, 1835, 1836, p. 793; Throop's Ann. Code of Civ. Pro. (N. Y.), par. 8, p. 6, Galland vs. Galland, 44 Cal., 475, 479. "The force of public opinion in this country, in favor of the freedom of the press, has restrained the free exercise of the power to punish this class of contempts" (constructive), "and in many jurisdictions statutes have been enacted depriving the courts of the power to punish them." Rapalje, Contempts, Sec. 56.

In my opinion, the sentence and commitment, if for a constructive contempt, are illegal and invalid for lack of jurisdiction on the part of the court to impose such sentence or order such commitment, no judgment of guilty of such offense having been rendered. The petitioner should be discharged.